WILL OR NO WILL? THE EFFECT OF FRAUD AND UNDUE INFLUENCE ON TESTAMENTARY INSTRUMENTS

I

That a will obtained by fraud or undue influence is invalid is settled law. In what does fraud or undue influence consist? The answer to this question calls for careful consideration and analysis, for the terms fraud and undue influence are only vaguely suggestive of their constitutive facts. Again, what is the effect of fraud or undue influence upon the status of a testamentary disposition? Do they render it voidable or void? Do they constitute negative or affirmative defences to a contested will? These are the questions which it is proposed to consider.

II

Fraud and undue influence affect transactions *inter vivos* as well as wills. Let us first examine the nature of fraud and the nature of undue influence, and the effect of each upon written instruments. We will then consider whether there is any difference between their effect on non-testamentary instruments and their effect upon wills.

Beginning with fraud: We may distinguish the following types of fraud which may effect the validity of a written instrument:

(1) Fraud by which the maker of an instrument is deceived as to the nature or contents of the instrument which he is signing, usually called fraud going to the factum.[1]

(2) Fraud by which the maker of an instrument is induced by some form of deceit to execute an instrument of whose nature and contents he is fully aware. This form of fraud is termed "fraud in the inducement".[2]

(3) Fraud where there is deceit neither in the factum nor in the inducement, but where some injury or injustice results from

[1]The term "factum", generally applied to sealed instruments, has by extension been applied to wills and other instruments. "The *factum* of an instrument means, not barely the signing of it, and the formal publication or delivery, but proof in the language of the *condidit*, 'that he well knew and understood the contents thereof,' 'and did give, will, dispose, and do in all things as in the said will is contained'." Sir John Nicoll in Zacharias *v.* Collis (1820) 3 Phillim. 176, 179. See also Weatherhead's Lessee *v.* Baskerville (52 U. S. 1850) 11 How. 329, 354.

[2]Page, Wills (1901) § 124; Gardner, Wills (2d ed. 1916) 153.

the instrument, either to the maker or to another. This may be termed "fraud in the effect".[3]

Let us now consider the effect on a written instrument of each of these types of fraud. It appears that in the early English law very little if any relief was given against fraud, either civil or criminal. The famous remark of Lord Holt "Shall we indict one man for making a fool of another?"[4] seems to have expressed the primitive legal attitude towards all kinds of fraud.[5]

Fraud in the factum developed as a defence to deeds in the fourteenth and fifteenth centuries in cases where the contents of such deeds were read falsely to illiterate grantors. Thus, where a deed in fee was read to an illiterate as a deed in tail, it was held the grantor could show these facts under the plea of *non est factum;*[6] and in 1582, through the decision in *Thoroughgood's* Case,[7] this doctrine of the Year Books became the established modern law.

Although the doctrine we are considering first arose in cases affecting illiterate grantors, it was soon extended to include all cases of deceit as to the contents of an instrument, whether the person executing the same were literate or illiterate. Even before *Thoroughgood's* Case,[8] it had been held that if a deed be read falsely to the grantor by one in whom the latter has had confidence, the deed is void, whether the feoffor "be lettered or not lettered", "because he has had faith in me and I have deceived him."[9] Thus it became settled law that deceit as to the contents of a deed renders it absolutely void, and this principle has since been applied to all classes of contracts and conveyances. Even a bill of exchange has been held void in the hands of a *bona fide* purchaser where the maker of the bill signed it without negligence under the fraudulent statement that it was a guaranty.[10]

---

[3]Chand, Consent (1897) 58. These three types of fraud are all that will be considered in this article. For other classes of acts often included under fraud see Page, Contracts (2d ed. 1920) § 217.

[4]Reg. *v.* Jones (1704) 2 Ld. Raym. 1013.

[5]"Our law—though quite willing to admit in vague phrase that no one should be suffered to gain anything by fraud—was inclined to hold that a man has himself to thank if he is misled by deceit: 'It is his folly'." 2 Pollock and Maitland, Hist. Eng. Law (2d ed. 1899) 536.

[6]Y. B. 30 Edw. III f. 31. See also Y. B. 9 Hen. V f. 15a; Y. B. 9 Hen. VI f. 59; Y. B. 14 Hen. VIII 26a.

[7](1582) 2 Co. 9b.

[8]*Ibid.*

[9]Keilw. 70 b, pl. 6.

[10]Foster *v.* Mackinnon (1869) L. R. 4 C. P. 704; Lewis *v.* Clay (1898) 67 L. J. Q. B. 224.

Fraud in the inducement of a deed did not affect its validity at law; the only remedy being in equity, where the party guilty of the fraud was made a constructive trustee of any property thus obtained.[11] In case of a purely promissory writing under seal, like a bond, the same principle obtained, the sole remedy being in equity.[12] It followed naturally that the burden of establishing the fact of fraud rested upon the plaintiff, since this was the ground on which he was trying to deprive the defendant of a vested legal right. When, later, the defence of fraud in the inducement was allowed in courts of law, it was dealt with on equitable principles, and the burden of establishing it as a defence was therefore put upon the defendant.[13] On the other hand, fraud affecting the factum of an instrument is provable under a denial by the defendant that the instrument is his, and the burden of proof on such an issue is upon the plaintiff.[14] These distinctions result from the fact that fraud in the inducement makes the instrument voidable only, whereas fraud in the factum makes it void.

Under the term "fraud in the effect" we may include all transactions where, though there be no deception, a result ensues which is unjust either toward one of the parties or toward some third party. Thus, where an insolvent debtor makes a gift of any of his property, such gift is a fraudulent conveyance against his creditors, although no one is deceived in such a transaction.[15] Again, if an heir promises his ancestor that if the latter will allow land to descend to him, he will convey it, in the event of such descent, to a beneficiary designated by the latter, it has been held a fraud upon the ancestor for the heir not to carry out his promise,[16] and this irrespective of whether or not the heir meant to perform the promise at the time he made it; in such a case, we might well have fraud in the effect, whereas unless there was an original intent not to abide by the promise, we should not have

[11]Broderick *v.* Broderick (1713) 1 P. Wms. 239; 1 Perry, Trusts (6th ed. 1911) § 171.

[12]Jackson *v.* Hills (N. Y. 1828) 8 Cow. 290; Hartshorn *v.* Day (60 U. S. 1856) 19 How. 211; George *v.* Tate (1880) 102 U. S. 564.

[13]Lefler *v.* Field (1873) 52 N. Y. 621; Dubois *v.* Hermanse (1874) 56 N. Y. 673; Coulson *v.* Whiting (N. Y. 1884) 14 Abb. N. C. 60.

[14]Whipple *v.* Broun Brothers Co. (1919) 225 N. Y. 237.

[15]French *v.* French (1855) 6 De G. M. & G. 95, 101; Freeman *v.* Pope (1870) L. R. 5 Ch. App. 538, 544.

[16]Sellack *v.* Harris (1708) 5 Vin. Ab. 521; Lewin, Trusts (12th ed. 1911) 64.

fraud in the inducement. An unjust or immoral result without deceit is then the earmark of this third type of fraud.[17]

III

Leaving for the moment the subject of fraud, we come to the equally vague term "undue influence". Probably this expression came into the English law of wills through an extension of the idea of duress. Under the Roman Law, forcing a testator to make a will under a threat of violence was a ground both for a civil and a criminal action against the wrongdoer.[18] In regard to the Civil Law as administered in the English ecclesiastical courts, Swinburne, writing in 1590, states such a will to be invalid on the ground that it is made under fear.[19] Later, Swinburne states that a will obtained by importunity may be invalid, thus: "The fifth case is, where the persuader is very importunate: for an importunate beggar is compared to an extorter, and it is an impudent part still to gape and cry upon the testator and not to be content with the first or second denial."[20] Sixty years later, we find Rolle, C. J., holding that a will obtained by the over-importunity of the testator's wife is to be treated as "a will made by constraint and not a good will."[21] This idea of an importunity which the testator is unable to withstand seems to have been the entering wedge of the doctrine of undue influence into our law of wills.[22]

In England and in this country there has at times been a tendency to confuse undue influence with fraud. This is due to two reasons, first, because fraud in the nature of deceit is very apt to be present where an instrument is affected by undue influence; and second, because the definition of fraud in some decisions

[17]Ce que les docteurs appelaient *fraus non in consilio sed eventu.*" Chardon, dol et Fraude 3 (quoted in Chand, Consent 58). Hukm Chand in his valuable "Law of Consent" (Bombay, 1897) calls attention to the distinction made in the Civil Law between *"fraude"* and *"dol"*, the latter involving deceit, while the former does not. The French *"fraude"* is covered in part in English law by the term "constructive fraud"; Chand, *op. cit.* 57-59.

[18]Jus. Code VI, tit. xxxiv, 1.

[19]Swinb., Wills (1611) VII, § II.

[20]Swinb., *op. cit.* VII, § IV.

[21]Hacker *v.* Newborn (1654) Style, 427.

[22]"Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist;—such as will render the act no longer the act of the deceased;—not the free act of a capable testator, in order to invalidate an instrument." *Per* Sir John Nicholl, in Kinleside *v.* Harrison (1818) 2 Phillim. 449, 551. And so Constable *v.* Tufnell (1833) 4 Hagg. Ecc. 465, 485; Hall *v.* Hall (1868) L. R. 1 P. & D. 481, 482.

is broad enough to include undue influence.[23] The terms are, however, clearly distinguishable. As far as the execution of instruments is concerned, the term fraud ordinarily suggests the idea of deception; whereas undue influence suggests the idea of a coerced volition.[24]

In England, in cases affecting the execution of wills, undue influence is now distinguished from fraud; the latter is limited to cases where the testator has been the subject of deception while the former is restricted to cases of coercion,[25] and the same distinction has met with approval in this country.[26]

In general, persuasion is not undue influence unless it amounts to coercion.[27] In some cases of transactions *inter vivos,* however, where there is a special relation of trust and confidence between

---

[23]"Legal fraud, which especially in bankruptcy cases, means an act unwarranted by law to the prejudice of a third person, and not that crafty villainy, or grossness of deceit to which it is applied in common language." *Per* Wilmot, L. C. J., in Harman *v.* Fishar (1773) Lofft 472. "The influence must be undue to have that effect [*i. e.,* invalidate a will]; that is, the will must have been executed under the influence of force, fear or fraud." Holdsworth, Law of Succession (1899) 69. "While undue influence embraces fraud, fraud by no means embraces every species of undue influence; since it is quite supposable that one may really exercise a degree of influence over the testator in producing the testamentary act, which upon every just ground is fairly entitled to be considered extreme and unreasonable, either in character or degree, without its being really fraudulent." (1864) 1 Redfield, Wills 510, 514. Here the learned author may be using the term fraud in the sense of "caused by deceit", or of "unjust and illegal in its result", *i. e.* fraud in the effect. In the former sense, fraud does not include undue influence; in the latter, in a loose sense, it does. Again, it may be that what is meant in the above extract is that unless the influence amounts to coercion it is not fraudulent in the sense of being "undue". See also Lynch *v.* Clements (1874) 24 N. J. Eq. 431, 435. All this illustrates the lack of precision in the use of the terms fraud and undue influence.

[24]See Ginter *v.* Ginter (1909) 79 Kan. 721, 735, 736, 101 Pac. 634.

[25]"To be undue influence in the eye of the law there must be—to sum it up in a word—coercion." Sir James Hannen, P., in Wingrove *v.* Wingrove (1885) L. R. 11 P. D. 81, 82. In England it has been held that under a plea of undue influence evidence of fraud is inadmissible. White *v.* White (1862) 2 S. & T. 504. And yet, it is stated that a will is free from undue influence if made "without coercion or fraud". Boyce *v.* Rossborough, 6 H. L. C. 48. For the English forms of defences in these cases see Tristram and Coote, Prob. Pr. (15th ed. 1915) 441, 442.

[26]Matter of Van Ness (1912) 78 Misc. 592, 597, 598, 139 N. Y. Supp. 485. Fowler, S., in his learned and valuable opinion in the above case, says: "Fraud and undue influence are, in turn, distinct and not distinct offenses. . . . But in respect of the principle that ought to control this adjudication, it may be announced in brief, that undue influence in law always imports coercion in and about the will itself." And so Children's Aid Society *v.* Loveridge (1877) 70 N. Y. 387, 394; *In re* Campbell's Will (1912) 136 N. Y. Supp. 1086, 1104, 1105.

[27]Parfitt *v.* Lawless (1872) L. R. 2 P. & D. 462, 469.

a donor and donee, persuasion may amount to undue influence,[28] but this doctrine does not, by the better view, apply in cases of wills.[29]

Fraud and undue influence, for the sake of clearness, should be distinguished. Hereafter, therefore, in this article, unless the expression "fraud in the effect" is used, the term fraud will be restricted to cases of deceit, whereas undue influence will be confined to cases of coercion.

In cases of deeds, and of contracts *inter vivos* generally, the effect of undue influence is to make the instrument voidable but not void. The invalid deed may be set aside in equity,[30] but in the case of a parol executory contract the defence of undue influence, though it may be deemed equitable in principle, has been held pleadable in an action at law.[31]

IV

As we have seen, fraud in the factum of a deed or contract makes the instrument void. The same result follows in the case of a will. Thus where a will was signed by the testator under the impression it was an authority for the testator's burial it was held void.[32] If the testator intends the will to be drawn in one way and it is drawn in another, and the change in the contents is not brought home to his knowledge, the part that does not coincide with his instructions is invalid.[33] In these cases the testamentary intent is lacking: as to the whole instrument, if the whole be fraudulently misdescribed to him; as to the fraudulent portion, if it be misdescribed in part alone.[33]

This rule is well-settled on authority, and yet its results, in one case at least, have not been observed. In an early English case it is stated that courts of equity "may in notorious cases declare a legatee, that has obtained a legacy by fraud, to be a

---

[28] *Ibid.*

[29] *Ibid.*

[30] Harding *v.* Handy (24 U. S. 1826) 11 Wheat. 103; Anthony *v.* Hutchins (1872) 10 R. I. 165; Devlin, Real Estate and Deeds (3rd ed. 1911) § 84.

[31] Zeigler *v.* Illinois Bank (1910) 245 Ill. 180, 196, 91 N. E. 1041.

[32] Hildreth *v.* Marshall (1893) 51 N. J. Eq. 241, 27 Atl. 465.

[33] Mere misstatement of the contents, even without fraud, is sufficient to make the misdescribed portion invalid. See Hastilow *v.* Stobie (1865) L. R. 1 P. & D. 64; Guardhouse *v.* Blackburn (1866) L. R. 1 P. & D. 109; Morrell *v.* Morrell (1882) 7 P. D. 68; Waite *v.* Frisbie (1891) 45 Minn. 361, 47 N. W. 1069.

trustee for another: as if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee."[34] This passage seems to imply that the inserted legacy was not brought to the testator's attention; if so, there can be no constructive trust, because the fraud in the factum makes the legacy void, and leaves no legal interest to which the trust can attach. It may be urged that the fraud might be overlooked upon probate, through inadvertence or ignorance of the facts. This does not alter the fact that the so-called legatee owes his legacy, not to the legal effect of his fraud, but to the grace of the next of kin in negligently allowing the will to go to probate. The total result of the fraudulent substitution is not for the wrongdoer to obtain a legacy but to prevent another from obtaining one, and on principle it would seem as if the remedy for the wrong should be an action on the case against the wrongdoer.[35] It seems clear that nothing could have passed under the operation of the will itself because the fraud in the factum made it an absolute nullity.

Turning now to fraud in the inducement, we find among text-writers either an absence of separate comment on it at all,[36] or a conflict of opinion as to its effect. One author states that a will obtained by fraud is voidable but not void.[37] Another states that fraud going to the factum makes a will void, whereas fraud in the inducement has no effect at all upon its validity.[38] Amid dearth or discordance of opinion, a careful consideration of this point will not be out of place.

In the case of a deed obtained by fraud the remedy is in equity,[39] and equity at first also took jurisdiction in cases of wills obtained by fraud.[40] Eventually, however, the chancery courts refused to interfere in such cases. As to personalty they held that there was an adequate remedy in the probate court, which could refuse to allow probate of any legacy fraudulently obtained, and as to

[34]Marriott *v.* Marriott (1726) 1 Strange 666, 673. Cited with approval in Allen *v.* M'Pherson (1847) 1 H. L. C. 191, 212.

[35]See Ames, Constructive Trusts (1907) 20 Harvard Law Rev. 549, 554.

[36]Jarman, Wills (6th ed. 1910) 31, 50.

[37]Gardner, Wills (2nd ed. 1916) 153, n. 20.

[38]Page, Wills (1901) § 124. The authorities cited by the author, however, do not support his position. See Moore *v.* Heinecke (1898) 119 Ala. 638, 24 So. 374, which states the opposite.

[39]*Supra,* footnote 30.

[40]Gosse *v.* Tracy (1715) 1 P. Wms. 286, 2 Vern. 699, 700, n. 9.

realty (the English probate courts having no jurisdiction over devises) that there was an adequate remedy in ejectment. In the leading case of *Allen* v. *M'Pherson*,[41] it was urged that where a legacy has been obtained by fraudulent aspersions on the character of one who would otherwise have taken the property, the case differs from that of fraud going to the factum, in that inasmuch as the testator knew the nature and contents of the instrument he was signing, he had the *animus testandi* necessary to make the instrument, at least in its legal effect, a will. The court of equity, however, declined to give any relief, holding that in cases of fraud, whether in the factum of a will or in its inducement, the remedy is either by opposing probate in case of a will of personalty, or by ejectment in case of a devise of realty. The same rule has been followed in the United States.[42]

Let us now consider what is the status in a probate court (or in a court of common law in cases of devises) of a will procured by fraud in the inducement. First of all, we must remember that in general a court of probate has no equitable powers and is incompetent to declare a trust.[43] Again, ejectment is a purely legal remedy and can be brought only by one having a legal right in the land,[44] and yet it is the sole remedy against a devisee who by fraud in the inducement has persuaded a testator to devise land away from his heir.[45] Furthermore, if an heir wished to bring ejectment in such a case, but could not because the legal right to immediate possession happened to be in the holder of a term for years given by way of mortgage, the heir was allowed to bring a bill in equity to oust the devisee from the land; but, even in this case, equity never declared the devisee a constructive trustee, but had the question of the validity of the devise tried at law in an action where the sole issue was *devisavit vel non*, and awarded possession to the heir if this issue were decided in his favor.[46] It would

[41](1847) 1 H. L. C. 191.

[42]*Re* Broderick's Will (88 U. S. 1874) 21 Wall. 503.

[43]*Ibid.* 510; Moore *v.* Winston (1880) 66 Ala. 296; Meyers *v.* Farquharson (1873) 46 Cal. 190; *In re* Estate of Glover & Shepley (1895) 127 Mo. 153, 29 S. W. 982. Some equitable powers, however, in certain jurisdictions are conferred by statute. Matter of Kent (1915) 92 Misc. 113, 116, 155 N. Y. Supp. 383.

[44]Allen *v.* Woods (1893) 4 Rep. 249, 68 L. T. 143.

[45]Kerrich *v.* Bransby (1727) 7 Bro. P. C. 437; Jones *v.* Gregory (1863) 2 De G. J. & S. *83.

[46]See Jones *v.* Jones (1817) 3 Meriv. 161; 3 Story, Eq. Jur. (14th ed. 1918) § 1899 n. 6, p. 486.

seem to follow that wills procured either by fraud in the factum or by fraud in the inducement are alike void, and that the distinction made between these two classes of fraud in their effect on instruments *inter vivos* does not apply to testamentary instruments.[47]

If a will procured by fraud in the inducement be deemed void, *a fortiori* a will is void if procured by undue influence. Coercion certainly makes a stronger case against the will than deception.[48]

V

Passing now to fraud in the effect, we find that this type of fraud, while it does not affect the legal validity of the will, has been used as a ground for raising constructive trusts against legatees or devisees who have promised the testator to hold their legacy or devise in trust for a beneficiary named by the testator in some manner that does not comply with the requisites of the statutes regulating the form of wills; that is, by some oral declaration, or some unsigned or unattested writing. As these cases, both as affecting wills and conveyances *inter vivos,* have been collected and fully dealt with by other writers,[49] all that will be done here is to make a brief statement concerning the effect of some of these decisions.

The majority of decisions hold that, where an informal trust has been communicated by the testator to the devisee or legatee named in the will, the devisee or legatee is subject to a constructive trust in favor of the intended *cestui que trust,* but that no such trust arises unless the purpose of the trust has been specifically made known to the devisee or legatee during the lifetime of the testator.[50] Before considering the correctness of the foregoing position, it will be well to reflect on several possible situations which might arise between the intended trustee and the testator. First, we may suppose that the intended trustee did not mean

[47]In Powell, Devises (Dubl. ed. 1791) 696, 697, some early cases are cited contrary to this view. These cases seem unsound and are no longer law.

[48]See Sheehan *v.* Kearney (1903) 82 Miss. 688, 700, 21 So. 41.

[49]Costigan, Constructive Trusts Based on Promises to Secure Bequests, Devises or Intestate Succession (1915) 28 Harvard Law Rev. 237, 366; Stone, Resulting Trusts and the Statute of Frauds (1906) 6 COLUMBIA LAW REV. 326; Ames, Constructive Trusts Based upon an Express Oral Trust of Land (1907) 20 Harvard Law Rev. 549.

[50]*Re* Fleetwood (1880) L. R. 15 Ch. D. 594; *Re* Boyes (1884) L. R. 26 Ch. D. 531. See also Costigan, *op. cit.* 369.

what he said when he agreed to the trust, and that the will was made in reliance on this intentionally false promise. This is a case of fraud in the inducement of the will; in such a case, before any constructive trust can be raised, we must decide whether the will is voidable or void; for, if we hold it to be void, there is no legal interest passing by the will to which a constructive trust can attach. Second, the will may be made first, and the promise to hold in trust may be made afterwards, though without intent to keep the promise. In such a case, there is no fraud in the inducement, although there is a deceit subsequent to making the will. In this case, a legal interest would pass under the will to the promisor which might be subjected to a constructive trust. Third, the intended trustee may mean to keep his promise when he makes it, and afterward change his mind; and lastly, he may be willing at all times to carry out his promise. In the third case, we have fraud in the effect; and in the last case, there is no fraud at all if the trust be carried out.

Assuming, however, that we have a situation where there is a legally valid will, should the intended trustee be subjected to a constructive trust, and, if so, for whose benefit?

The Statute of Frauds and the other statutes regulating the execution of wills require a testamentary trust to be in the form of a will, but exempt from this requirement trusts arising by operation of law.[51] It may be conceded that we may rightly assign to the class of constructive trusts all cases where property has been obtained by fraud, or where its retention would result in unjust enrichment at the expense of a grantor. These are cases to which that hard-worked aphorism that "the Statute of Frauds will never be allowed to work a fraud" has a just application. It follows that in all cases where property has been obtained under a will because of a promise to hold in trust, the person making the promise cannot retain the property, for to permit this would be to allow unjust enrichment.[52]

In whose favor should this constructive trust be raised, in favor of the intended *cestui que trust* as shown by the informal declaration, or in favor of the legal representatives of the testator? Those who favor the former result argue that not to carry out the trust is a fraud on the testator who has relied on the promise of the devisee or legatee, and also a fraud upon the intended

[51]St. 29 Ch. II c. 3 § 7, 8.

[52]Stickland *v.* Aldridge (1804) 9 Ves. 516.

cestui que trust in that it keeps him from getting a benefit that he was intended to receive, and might have obtained in some other way but for the reliance of the testator on the intended trustee's promise.

It must be admitted that there is fraud upon the testator, either fraud by way of deceit, or fraud in the effect, in all cases where a devisee or legatee tries to keep for himself that which he obtained by promising to hold for another. If we say that this fraud must be remedied by restoring to the testator's estate what has been obtained from it, the case is a simple one, and no conflict with the Statute of Frauds arises; because that statute, as far as wills are concerned, intended to render void only informal trusts created by the testator, and had no thought of affecting constructive trusts created by the court in favor of his estate.[53] If, however, we raise a constructive trust in favor of the informally named *cestui que trust,* we have to consider whether we are not, under the guise of a constructive trust, enabling the testator to carry out a defectively executed testamentary provision.[54] We must not confuse the unjust enrichment of the legatee with the disappointed expectation of the testator; the former should be remedied; the latter ought not to be, because the statute forbids.[55]

Suppose an estate of one million dollars is bequeathed to A. On the testator's death, it appears that A agreed orally with the testator to divide this legacy into twenty equal parts and to pay these equal portions over to as many different *cestuis que trust.* It is startling to be told that the law will enforce such a provision, and yet this is the result of the line of decisions to which we have referred.[56]

---

[53]See Lewin, Trusts (12th ed. 191) 217.

[54]"But call it what you will, and argue as you may, a parol trust engrafted upon a written bequest by parol testimony by a decree of a court, after the death of the testator, is *pro tanto* the establishment of a parol will for the testator." Coleman, *J.,* in Moore *v.* Campbell (1893) 102 Ala. 445, 452, 14 So. 780.

[55]It must be remembered that in cases *inter vivos* we may have trusts intended for the benefit of the grantor; but in will cases the express trusts are never for the testator, but for some equitable beneficiary who is to take after the testator's death. Therefore, unless such trusts are covered by the Statute of Frauds there would be no trusts on which the statute could operate. The result is that such trusts are undisputably within the statute. But, if telling the terms of the trust to the intended trustee is all that is required to make the trust binding as a constructive trust, then by this questionable device all these cases may be taken out of the statute. It seems that such cannot have been the intent with which the statute was framed. It is a merciful after-thought of ingenious judges who have saved the hard cases, but, as usual, made bad law.

[56]*Supra,* footnotes 50, 52.

Suppose now we take the same case with one fact subtracted, that is, suppose the names of the beneficiaries are not communicated during the testator's life to the intended trustee. Then the same court would hold there could be no constructive trust in favor of the informally created *cestui que trust.*[57]

Again, suppose there be no communication of the trust to the intended trustee, but an informal memorandum of the trust is found after the testator's death. Then the devisee or legatee keeps what he has received, being subject to a constructive trust neither in favor of the estate of the testator nor in favor of the intended *cestui que trust.*[58]

In dealing with the case where the fact of a trust is communicated by the testator, but not its terms, an English decision says: "The devisee or legatee cannot by accepting an indefinite trust enable the testator to make an unattested codicil."[59] Agreed. Why then should he be able to do so by accepting a definite trust? In each case the conscience of the intended trustee is charged with responsibility for the conduct of the testator. If the fact that he is to hold for another is communicated to the trustee during the life of the testator, it is as much of a fraud for the trustee to keep the property away from the intended *cestui que trust* as it is to do so when the name of the *cestui que trust* is communicated, and there is as much ground for a constructive trust in the first case as in the second. The courts have declined, however, to take this next step because of distrust of the step they have taken before, sensing the fact that the opposite result would unduly narrow the field in which the statute could operate.

And yet there is one further step which might well be taken if we are to tolerate any constructive trust in favor of the intended beneficiary. Suppose a devise to A, accompanied by an unattested letter not revealed to A before the testator's death, saying that A is to hold in trust for B. Is it equitable that A should retain the beneficial interest when the intentions of the testator that he should not do so are absolutely clear? If payment under mistake creates an equity to repay, why should not a devise under the mistaken notion that the devisee will be a trustee create a constructive trust in favor of the intended beneficiary? The devisee in such a case is a mere volunteer, and should be subject to the

[57] *Re* Boyes, *supra,* footnote 50.

[58] Juniper *v.* Batchelor (1868) W. N. 197, Ames, Cases on Trusts (2nd ed. 1893) 189. See Costigan, *op. cit.* 366.

[59] *Re* Boyes, *supra,* footnote 50, pp. 536, 537.

equity created by the testator's mistake. In dealing with the case where the trust has been communicated to the intended trustee, Professor Costigan thus forcibly states the case in favor of the intended *cestui que trust:* "It being plain that the devisee must not be allowed to keep for himself, chancery looks around for an appropriate *cestui que trust.* What more appropriate selection could equity make than the *cestui que trust* who would have been express *cestui que trust* but for the failure of the testator to put his wishes in correct form?"[59b] So too it seems as if, from the standpoint of equity only, a mere volunteer should not keep a beneficial interest which he is receiving solely because of the testator's mistake as to the form of his will. But the courts in this last case refuse to follow their equitable logic through, because to do so would practically wipe out testamentary trusts from the Statute of Frauds. Here we have to do, not with the equities of the situation, but with the enforcement of a rule of formal law. Granted that in some cases the Statute of Frauds should not be allowed to work a fraud, it must never be forgotten that there are cases where the policy of the statute allows and intends to allow fraud, because the fraud checked overbalances the fraud thus allowed. It is literally true that the statute permits fraud in order to prevent it. When, however, the hard cases we have been considering have come before the courts, the fraud upon the testator and upon his intended *cestui que trust* being vividly present before the court's mind, the benefit that comes from restraining fraud by strict adherence to the statutory rule has in some instances been forgotten. The result is a series of cases that seem unsound in reasoning and contrary to the real meaning of the Statute of Frauds.[60]

VI

When the issue of fraud or undue influence is raised in a will contest, should the burden of proof in regard to these facts rest upon the proponent or upon the contestant? Should these issues be raised under pleas in confession and avoidance or under pleas in denial?

[59b] Costigan, *op cit.* 267.

[60] From the standpoint of equity alone, nothing more can be said than is set forth in Professor Constigan's learned and able article, *ubi supra.* In this article (p. 392) he states that "there sems to be no occasion to fear that any appreciable number of constructive trusts have been raised, or will be raised unwarrantably." But the real question is, ought we to interpret the statute so as to carry out an informal express trust as a constructive trust, *i. e.,* did the statute mean that this should be done?

In the case of instruments *inter vivos,* it has been pointed out that fraud in the factum makes the instrument void, while fraud in the inducement makes it voidable only.[61] Hence fraud in the factum creates a negative defence, whereas fraud in the inducement should be pleaded in confession and avoidance.[62] Indeed, fraud in the inducement in the case of deeds could be remedied originally only through an equitable obligation, usually in the form of a constructive trust; and this is still the rule as to deeds that are conveyances.[63] When used as defences to an executory obligation in an action at law, the pleas of fraud and undue influence should be treated as mere substitutes for equitable relief, and hence should be pleaded and proved affirmatively, just as the plaintiff in equity had to plead and prove them when he brought his bill.[64]

Turning now to contested wills, it seems clear that fraud in the factum of a will is a negative defence, and that the burden of establishing freedom from such fraud rests upon the proponent, although the looseness in the form of the pleadings in probate courts often disguise this fact.[65] Should the rule that makes fraud in the inducement and undue influence affirmative defences in the case of instruments *inter vivos* also be followed in the case of wills? The reasons in favor of an affirmative answer are thus stated in a Massachusetts decision by Hoar, *J:*

"Where the issue of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument, which he executes with all the legal formalities, shall take effect as his will, was induced to execute it by the controlling power of another, we think that the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of

---

[61]*Supra,* p. 864.

[62]*Supra,* footnotes 12, 13, 14; see also Gould, Pl. (6th ed. 1909) 497.

[63]1 Perry, Trusts (6th ed. 1911) § 171.

[64]See May *v.* Magee (1872) 66 Ill. 112; Finck *v.* Schmitt (1905) 48 Misc. 503, 96 N. Y. Supp. 197; 8 Encyc. Forms Pl. & Pr. 844-858; Bradbury, Rules Pl. (1911) 1284.

[65]Thus in England the want of knowledge and approval of the testator is set up by a special defence. Trist & Coote, Prob. Pr. (15th ed. 1915) 443. Still, the burden of proving knowledge and approval is on the proponent. Tyrrell *v.* Painton (1894) L. R. P. 151, 156; Cleare *v.* Cleare (1869) L. R. 1 P. & D. 655; Atter *v.* Atkinson (1869) L. R. 1 P. & D. 665, 668. See also Hastilow *v.* Stobie (1865) L. R. 1 P. & D. 64; Hegarty *v.* King (1880) 5 L. R. Ir. C. D. 249, 7 L. R. Ir. C. D. 18. And so Matter of de Castro (1900) 32 Misc. 193, 66 N. Y. Supp. 239; Jess. Redf., Surr. Pract. (1916) 319.

proving it. . . . When all is proved that the statute requires; when a testator of sound mind has intentionally made and published a will according to the forms of law, his will is as much a legal conveyance and disposition of his property as any other lawful instrument of conveyance. It may be impeached or made invalid by proof of fraud, duress, or undue influence which have caused it to contain provisions which he has been wrongfully induced to insert in it, but so may a deed or other contract be impeached for the like reason.

The defence of duress or fraud, when made in avoidance of a deed, is required to be specifically pleaded, and is not good under the issue of *non est factum*. The reason seems to be, that the instrument is voidable and not void; it is the deed of the maker of it; and, if he would avoid it, he is called upon to prove the existence of facts which will authorize him to do so. Yet the issue of fraud or duress involves the question whether the deed was ever obligatory, as much as the same issue does the original validity of a will. It is true that the distinction between a voidable and a void act has no precise application to a will; because a will is in its nature revocable, and may be set aside by a testator at his pleasure. But the question whether a will is his free act, the product of his own volition and not of another's, is essentially the same as in the case of a contract; and there is no positive statute rule to make a difference in this respect."[66]

The force of the foregoing arguments cannot be denied, but the question arises whether a will has not in its nature something which distinguishes it from deeds and contracts, and whether the same results necessarily flow from the formal execution of the one as those that flow from the execution of the others. On examination, certain differences at once appear. From the moment of execution, the deed and the contract are each bilateral instruments, not necessarily in the sense of creating bilateral obligations, but in the sense that two parties are immediately affected by each instrument from its inception. On the other hand, the will at the moment of execution is a strictly unilateral instrument, and so remains until the testator's death.[67] Again, the deed is effective on delivery; the contract on apparent mutual assent; whereas the will is complete as soon as the testator has caused it to be legally authenticated. Once executed, the deed or contract

[66]Baldwin *v.* Parker (1868) 99 Mass., 79, 85, 86.

[67]On the unilateral nature of the modern will and of the history of its replacement of the old bilateral arrangement by which a successor was named by the testator before death, see Maine, Ancient Law (4th Am. ed. 1906) 197 *et seq.;* McMurray, Liberty of Testation, Wigmore Celebration Legal Essays (1919) 543 *et seq.*; *Hübner, Grundzüge des deutschen Privatrechts* 731, translated under the title, History of Germanic Private Law (Continental Legal History Series) 750 *et seq.*

requires a bilateral consent to effect its change; the will, on the contrary, remains ambulatory and, up to the testator's death, may be changed by his volition alone.[68]

These are radical differences, and they might well justify giving to a will obtained by fraud or undue influence a different effect from that of a deed or contract similarly obtained. Moreover, since the legal status of the deed begins on delivery, and since the deed of a freehold carries with it immediate seisin of the land, and is usually followed by a change of possession, it is only natural that a system of law that gives a certain legal effect even to a tortious seisin should hold that the effect of a deed obtained by fraud or undue influence is to pass the legal title. In addition, in the case of deeds and contracts thus induced there is in most cases a *quid pro quo* which the defrauded party has received, but which, in case of rescission, he can not justly retain; hence perfect justice can only be done either by a mutual reconveyance enforced through a court of equity, or by a rescission based on equitable principles in a court of law.

The natural result has been that in these cases the courts of law have decided that such instruments have a valid legal status, from which it necessarily follows that a plaintiff in equity or a defendant at law must bear the burden of proving the facts that sustain the bill in equity or the defence at law.

What now as to the will induced by fraud or coercion? What is the question there presented to the Court? Is it "Shall the legal status of the will be set aside?" Or, is it rather "Has the will a legal status?" If we apply to the contested will the same rules of procedure that apply to a voidable deed, are we not being misled by a false analogy? In the first place, it must be noticed that while a voidable deed can be set aside only in equity, the question of the effect of fraud or undue influence upon a will is decided in courts which admittedly have no equitable powers:[69] —in a probate court in the case of legacies; and, in cases of devises, in an action of ejectment or in an issue of *devisavit vel non*,[70] both of which are tried under the rules of courts of common law. It would seem to follow that the question being investigated in such a case cannot be whether there is an equitable defence or a right of rescission against an instrument that is legally valid, but

[68] Sharp *v.* Hall (1888) 86 Ala. 110, 5 So. 497.

[69] *Supra*, footnote 43.

[70] *Supra*, footnote 46. In some states, by statute, a probate court may adjudicate the validity of a will of land. N. Y. Code Civ. Proc. § 2614.

must be whether the instrument before the court has any legal validity. As is stated with absolute precision in a Mississippi case by Whitefield, *J:*

"It is not only necessary that the testator shall have testamentary capacity, but that that capacity shall be exercised freely and voluntarily. . . . Both are essential parts of the proponent's case. The issue is single—will or no will."[71]

Although the foregoing statement was made in relation to undue influence, the same is just as true on principle in the case of a will induced by fraud. In the case of *Barry* v. *Butlin*[72] where a will was alleged to be void both for fraud and undue influence, Baron Parke tersely says:

"The *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator."

It is fair to assume that Baron Parke means that the testator must be free both from deception and coercion; that such freedom, like the competency of the testator, must be proved by the proponent, and that, in the absence of such proof, the instrument in question is not shown to be the testator's will.

Much of the conflict on the question of the proper apportionment of the burden of proof is these cases has arisen because of the failure of courts to grasp the distinction between the two meanings of the term "burden of proof"—signifying at times the burden of establishing a proposition, and at times the burden of going forward with evidence,—a distinction which had not been made clear prior to the essay on this subject by the late James Bradley Thayer.[73]

To illustrate: In New York, in the case of *Tyler* v. *Gardiner*,[74] it was held that the "burden of proof" of undue influence is on

[71]Sheehan *v.* Kearney, *supra,* footnote 48, at p. 700. And so Campbell, *C. J.,* in Frazer *v.* Circuit Judge (1878) 39 Mich. 198, 199: "No matter how many different persons appeal, they can only raise one issue and there can be but one trial of that issue, which is to determine the question of will or no will. That is the only issue that can be raised and the only one to be decided. Its decision may involve, as all other issues involve, several subordinate facts, but they are not independent facts and cannot be presented separately." Approved in Dudley *v.* Gates (1900) 124 Mich. 440, 83 N. W. 97, 86 N. W. 959.

[72](1838) 2 Moore P. C. 480, 482.

[73]The Burden of Proof (1890) 4 Harvard Law Rev. 45; Thayer, Prel. Treat. Ev. (1898) 353.

[74](1866) 35 N. Y. 559.

the contestant, since undue influence is never presumed. This decision is entirely correct if the term "burden of proof" is used by the court in the sense of the burden of going forward with evidence; but it is incorrect if it means to put the burden of establishing undue influence by a preponderance of the evidence upon the party contesting the will. In such a case, the proponent asserts that the will in question is the testator's will; but, if the will is induced by undue influence, the sound view is that the instrument, though executed by the testator, is not "his will" in the sense that the law requires. If, then, on the whole evidence it be doubtful whether the will was induced by undue influence, it is doubtful whether it is "his will", and probate should be denied. The same rule should apply in the case of fraud. As is stated in a New York case by Surrogate Fowler:

"After the proponent shows a formal compliance with the Statute of Wills, the burden of going forward and making out proof of undue influence lies with the contestants. But where the ultimate burden of proof on the whole issues raised by the pleadings lies in a probate cause is another matter. There can be no doubt that it rests on the proponent."[75]

Although there is a conflict of authority on this question,[76]

[75]Matter of Van Ness (1912) 78 Misc. 592, 603, 139 N. Y. Supp. 485.

[76]See Wigmore, Ev. § 2502, for authorities both ways. In New York in Matter of Kindberg (1912) 207 N. Y. 220, 288, 100 N. E. 789, there is the following statement by Cullen, *C. J.*: "Undue influence is an affirmative assault on the validity of a will, and the burden of proof does not shift, but remains on the party who asserts its existence." (citing Tyler *v.* Gardiner (1866) 35 N. Y. 559; Cudney *v.* Cudney (1877) 68 N. Y. 148; Matter of Martin (1885) 98 N. Y. 193, 196; Tyler *v.* Gardiner, *supra,* at p. 594, merely makes this statement: 'The burden of establishing imposition and undue influence rests, *in the first instance, upon the party by whom it is alleged.* Fraud is never to be presumed. . . . When such evidence is furnished the *burden of repelling the presumption to which it leads is cast upon the party to whom the fraud is imputed.*" Cudney *v.* Cudney, *supra,* at p. 152, says: "To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred." Matter of Martin, *supra,* at p. 196, has the following statement: "The case then is one where the testatrix had testamentary capacity, a present knowledge of the contents of the will, and where at its execution she was surrounded by all the guards which the Statute has prescribed to prevent fraud and imposition. A will executed under these circumstances can be avoided only by influence amounting to force or coercion, and proof that it was obtained by this coercion. The burden of proving it is on the party who makes the allegation. These principles are well settled (citing Tyler *v.* Gardiner, *supra,* Cudney *v.* Cudney, *supra*) . . . There must be evidence that the parent was imposed upon, or overcome by the practices of the child to the benefit of the latter, *before the burden of proof can be shifted.*" (Italics not in original reports). It is submitted that none of the authorities cited justify the statemen in Matter of Kindberg, *supra,* that the burden of proof does not shift. All the cases are consistent with the meaning that the burden of going forward is upon the contestant, and

it is to be hoped that those courts where the matter is not already settled by authority will incline to what is believed to be the simpler and sounder view, which is that fraud and undue influence are only facts used in evidence on the issue raised by the denial of the will; and that even where practice requires these facts to be specifically pleaded, such pleading shall be deemed to be required (as is the case in England in the case of insanity or want of knowledge by the testator of the will's contents) only for the purpose of clearly specifying the facts of the defense, and not for the purpose of raising new issues, or of fixing the burden of establishing upon the contestant. As has been seen, the decisions to the contrary are due to two causes: first, to the failure to distinguish between the two meanings of the term "burden of proof"; secondly, to the still graver error of failing to distinguish the case where a legal status is to be set aside from the case where the existence of a legal status is to be determined.

RALPH W. GIFFORD

COLUMBIA LAW SCHOOL

---

both the Tyler case and the Cudney case recognize that this burden may shift. It is to be hoped that not the statement in the Kindberg case but that in the Van Ness case will eventually represent the New York law.

On the general question of where the burden of establishing fraud or undue influence lies, see: Barry *v.* Butlin (1838) 2 Moore P. C. 480; Tyrrell *v* Painton [1894] P. 151; Craig *v.* Lamoureux (P. C. 1919) 36 T. L. R. 26 (erroneously holding that since there is no presumption against a will drawn by a beneficiary, the burden of establishing fraud is on the contestant); Mayrand *v.* Dussault (1907) 38 Can. S. C. R. 460.